IN THE UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

IN RE:	§	
	§	
CUMMINS UTILITY, L.P.,	§	CASE NO. 01-47558-DML-11
	§	
DEBTOR	§	

MEMORANDUM OPINION AND ORDER

Before the court is the Request for Payment of Administrative Expenses (the "Request") filed by Cooper Power Systems, Inc. and Cooper Lighting, Inc. (collectively "Cooper") on February 14, 2003. The Request was heard by the court on March 17, 2003. In considering the Request, in addition to argument presented by counsel at the hearing, the court reviewed the Request, Cummins Utility, L.P.'s ("Debtor" or "Cummins") Response to Request for Payment of Administrative Expenses (the "Response"), Cooper's Post-Hearing Reply to the Response (the "Cooper Reply"), Cummins' response to the Cooper Reply (the "Cummins Reply") and certain other documents on file in this chapter 11 case, including Debtor's Amended Plan of Reorganization (the "Plan") and the order confirming the plan (the "Confirmation Order"). This court exercises core jurisdiction granted to it by 28 U.S.C. §§ 1334 (a) and 157(b)(2)(B) and (O). This matter is governed by FED. R. BANKR. P. 9014, and this memorandum opinion constitutes the court's findings of fact and conclusions of law. FED. R. BANKR. P. 7052 and 9014.

Cummins filed the Plan on January 7, 2003. By the Confirmation Order the court made findings of fact and conclusions of law and confirmed the Plan. Pursuant to this court's Order Granting Joint Motion to Approve Proposed Procedure for Administering Reclamation Claims

(the "Procedures Order"), and under the Plan, Cooper's claim is an administrative claim. The claim is not subject to dispute and is to be paid pursuant to the Plan, the Confirmation Order and the Procedures Order.

Discussion

Cooper had delivered goods to Cummins immediately prior to the commencement of Cummins' chapter 11 case. Cooper timely sought to reclaim the delivered goods under section 546(c) of the Bankruptcy Code (11 U.S.C. § 546(c)) (hereafter references to "sections" or to the "Code" shall be to the Bankruptcy Code). Because it was not clear at such an early stage of the case that Cummins' lenders, who held a lien on Cummins' inventory, would be paid in full, the court did not permit reclamation.[1] Thus, Cooper's reclamation claims were entitled to protection under section 546(c)(2)(A).[2] There were numerous reclamation demands made against Cummins, and it therefore devised methods for dealing with the resulting claims (which methods were adopted by the Procedures Order).

The issue presently before the court is when Cooper's administrative claims must be paid. No counterclaim has been asserted to Cooper's administrative claims and Cooper has not been named a defendant in any voidable transfer suit. Under the Plan, administrative claims are to be paid within ten days after the Allowance Date. Plan, ¶ 3.3.

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1 *See* 5 COLLIER ON BANKRUPTCY ¶ 546.04[2][a][ii] (15th ed. rev. 2003).

2 Section 546(c)(2)(A) provides:

> [T]he court may deny reclamation to a seller with such a right of reclamation that has made . . . a [reclamation] demand only if the court---
> (A) grants the claim of such a seller priority as a claim of a kind specified in section 503(b) of this title; . . .

The Plan defines Allowance Date "(i) as to a Disputed Claim as the date on which such Claim becomes an Allowed Claim by Final Order and (ii) as to any other claim that is not a Disputed Claim, as the date that is 180 days after the Effective Date."[3] Plan, Glossary of Terms, p. 30 (Appendix A). Cooper seeks payment of administrative expenses in the amount of $169,826.97 to Cooper Power Systems, Inc., and $24,226.12 to Cooper Lighting, Inc. Debtor argues that payment of Cooper's claims should be deferred until payment is due under the Plan, pending determination of whether Cooper received any preferential transfers from Cummins voidable under section 547(b) of the Code. *See* Code section 502(d). In the Cooper Reply, Cooper counters, first, that section 502(d) does not apply to administrative claims.[4] Second, Cooper asserts that absent the actual disposition or at least pendency of a voidable transfer action, payment to it cannot be delayed on such a basis. *See In re Lids,* 260 B.R. 680 (Bankr. D. Del. 2001) (there must be a judgment that a voidable transfer has occurred in order to invoke section 502(d)).

Cummins responds in the Cummins Reply that the Procedures Order specifically provides that payment of reclamation claims shall be subject to prior preference analysis, which may continue until payment is due. Cummins further argues that, since that date has not been reached, Debtor should not be required to pay Cooper at this time. If payment would not be due to Cooper until 180 days after the Effective Date, this argument would have merit, especially as

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[3] The Effective Date is defined in the Plan as the first business day following the Confirmation Date which, in turn, is defined as the date of entry of the Confirmation Order (the Confirmation Order was entered on January 15, 2003). *See* Plan, Glossary of Terms, pp. 32-3 (Appendix A).

[4] Cooper cites, *inter alia*, *In re* Rand Energy Co., 256 B.R. 712 (Bankr. N.D. Tex. 2000) for the proposition that section 502(d) applies only to prepetition claims.

the Confirmation Order is now *res judicata* and, hence, it and the Plan bind creditors (including Cooper). *Republic Supply Co. v. Shoaf*, 815 F. 2d 1046 (5th Cir. 1987).

The question of payment of Cooper, however, must be considered in the context not only of the Plan and Procedures Order but also of the Confirmation Order and the Bankruptcy Code. In the Confirmation Order, the court found that "[t]he Plan complie[d] with section 1129(a)(9) of the Bankruptcy Code because the holders of the type of Claims specified in that section [were to] receive cash in the amount of their allowed Claims on the *Effective Date*, unless a holder agree[d] to different treatment" (emphasis added). Confirmation Order, ¶ 20, p. 6; ¶ C, p. 8. Testimony proffered at the confirmation hearing was consistent with this finding. To the extent there is a conflict between the Plan and the Confirmation Order, the latter controls. Treatment of an administrative claim that is inconsistent with section 1129(a)(9)(A) is not permitted unless the holder of such claim agrees to the different treatment.

Because the Confirmation Order states administrative expenses will be paid in cash on the Effective Date, the court holds the Plan[5] must be considered modified by the Confirmation Order such that administrative claims are to be paid on the Effective Date.[6] There is no evidence

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[5] The court assumes the provisions of the Plan that would defer payment of claims were not originally meant to apply to administrative claims, though Debtor's counsel argued on March 17 and in the Cummins Reply that the six month delay in payment should apply. The court concludes that deferral of payment of administrative claims must have been a mistake in drafting of the Plan. The court has absolute confidence in the integrity of Debtor's counsel, and Debtor's counsel would have been aware that representing compliance with section 1129(a)(9)(A), when, in fact, the Plan did not comply, would at least cost counsel the court's trust and at worst require the imposition of severe sanctions. For these reasons, the court holds that the Plan in fact was intended to comply with section 1129(a)(9)(A).

[6] Section 546(c)(2)(B) of the Bankruptcy Code grants an reclamation claim "priority as a claim of a kind specified in section 503(b) . . .." Claims specified in 503(b) are, in turn, grouped under section 507(a)(1), which is the provision referenced in section 1129(a)(9)(A)'s requirement for payment on a plan's effective date. During the March 17 hearing the court raised the issue of whether Cooper actually *had* a claim under section 503(b) or merely a claim of that status. The Plan does not make such a distinction, however, making no separate reference to reclamation claims, and, even if such a distinction could be made, it does not affect the court's analysis here.

Cooper affirmatively consented to treatment other than as required by section 1129(a)(9)(A). Thus, Cooper's administrative claims were subject to payment on the Effective Date.

Cooper's acquiescence to the Plan and Procedures Order is an insufficient basis from which to infer its consent to treatment inconsistent with Section 1129(c)(9)(A). The court has found one case in which it was held that implied consent to treatment inconsistent with section 1129(a)(9)(A) could be found when the creditor responds to the proposal of such treatment with silence. *See In re Teligent, Inc.*, 282 B.R. 765, 772-73 (Bankr. S.D.N.Y. 2002). In *Teligent,* however, the debtor sent a consent form to each administrative creditor and provided the creditor with the option to accept treatment under the plan, to opt into a convenience class, or to decline to accept the treatment under the plan. *Id* at 769. The court there held that a creditor's failure to respond to the consent form amounted to acceptance by silence. *Id* at 771. Integral to the *Teligent* court's ruling, however, was the fact creditors were also given reason to understand the debtor intended to take a refusal to respond as an acceptance of the treatment.

Even if the court were prepared to adopt the reasoning in *Teligent*, it is inapplicable to the case at bar. Unlike the creditor in *Teligent,* there was no affirmative offer to Cooper of an option to accept or decline the proposed treatment. Further, there is no evidence Cooper was given reason to understand that silence as to different treatment of administrative claims would be interpreted by Cummins as acceptance of such treatment and so vitiate Cummins' obligation to provide Cooper with treatment consistent with section 1129(a)(9)(A). Finally, other courts, interpreting a similar provision in Section 1322(a)(2) of the Code, have required express consent

to different treatment. *In re Randolph*, 273 B.R. 914, 918 (Bankr. M.D. Fla. 2002). *See also In re Northrup*, 141 B.R. 171, 173 (Bankr. N.D. Iowa 1991); *cf.* 7 COLLIER ON BANKRUPTCY ¶ 1129.03[9][a] (15th ed. rev. 2003). The court in *Northrup* explained that the structure of the Bankruptcy Code and the general meaning of the word "agrees" suggests express consent is required. 141 B.R. at 173. This court agrees with the *Northrup* court. It is clear Cooper did not expressly consent to different treatment.

Conclusion

The Confirmation Order states as a finding that, as required by Code section 1129(a)(9)(A), administrative claims will be paid in cash on the Effective Date unless the claimant agrees to other treatment. There is no evidence of express consent by Cooper to treatment different from that required by section 1129(a)(9)(A), nor is there a pending objection to Cooper's administrative claims. Therefore, it is

ORDERED that the administrative claims of Cooper be paid without further delay.

Signed this the 16th day of April 2003.

DENNIS MICHAEL LYNN,
UNITED STATES BANKRUPTCY JUDGE